

The University of Chicago

THE LEGAL IMPLICATIONS OF THE
CONCEPT OF EDUCATION AS A
FUNCTION OF THE STATE

A PART OF A DISSERTATION SUBMITTED TO
THE FACULTY OF THE DIVISION OF THE
SOCIAL SCIENCES IN CANDIDACY FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF EDUCATION
1932

By
LEE ORVILLE GARBER

Private Edition, Distributed by
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PREFACE

This monograph is the summary of a dissertation presented for the Degree of Doctor of Philosophy at the University of Chicago. In it an attempt is made (1) to show, through an analysis of the debates of the constitutional conventions, the concepts that the framers of state constitutions had in mind concerning the proper relationship of the state educational system to organized society and to the individual; (2) to clarify the relation of the state to education as defined by the courts; and (3) to point out the applications which the courts have made of the concept of education as a state function to practical problems of school administration.

The sources of data used are of two main types. First, the reports of the debates and proceedings of 37 constitutional conventions were canvassed for the purpose of determining the attitude of the people toward the relations that should exist between education and the state. The second type of data used was court decisions as found in the reports of the various state and federal courts, especially the Supreme Court of the United States. Standard works on law such as the *American Digest System*, *Ruling Case Law*, and *Cyclopedia of Law and Procedure* were used. Likewise, the available literature dealing with the subject of school law was canvassed. The articles by Edwards in the *Elementary School Journal*, a monograph by Weltzin, and a pamphlet by Schroeder were especially helpful.

Two parts make up the book: Part I—Debates of State Constitutional Conventions, and Part II—Court Decisions. A list of selected references for Part I and a list

of selected cases for Part II appear at the end of the monograph. The numbers in the body of the report refer to the cases cited at the end of the monograph.

L. O. G.

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PART I

DEBATES OF

CONSTITUTIONAL CONVENTIONS



CHAPTER I

RELATION OF THE STATE TO EDUCATION AS REVEALED BY DEBATES OF CONSTITUTIONAL CONVENTIONS

In this chapter an attempt will be made to discover what the debates and proceedings of some of the constitutional conventions reveal concerning the proper relationship of the state to education.

For this purpose the reports of the debates and proceedings of 37 constitutional conventions—all that were available in the University of Chicago Library and in the State Library in Springfield, Illinois—were critically examined. The constitutional conventions, the debates of which were examined, were held between the years 1820 and 1925. Eight were held between 1820 and 1850; thirteen were held between 1851 and 1875; ten between 1876 and 1900; and seven between 1901 and 1925. Among the 37 reports studied, 24 different states were represented. In the case of seven states—California, Illinois, Kentucky, Massachusetts, Minnesota, Nebraska, and New Hampshire—the debates of two different conventions were examined; in the case of Michigan, New York, and Ohio the debates of three separate conventions were used. The 24 states represented in this study are fairly evenly distributed over the United States. They include New York on the east and California on the west, Minnesota on the north and Arkansas on the south. Fourteen are west of the Mississippi River and ten are east. Using an arbitrary classification, six may be considered as western states, three as eastern, five as southern, and ten as middle-western.

A study of the debates of these 37 conventions reveals the fact that the participants regarded public education as

conferring four main benefits upon society and upon the individual. In the first place, they regarded public education as essential to the political safety and well-being of the state. Over and over again, they expressed the conviction that the very safety and perpetuity of the state depends upon an intelligent citizenship. In the second place, they insisted that the economic well-being of the state is promoted by a system of public education. The delegates also regarded the public schools as the most effective agency at the state's disposal for the elimination of such social evils as pauperism and crime. Finally, a few regarded public education as a gift to be bestowed upon the individual by the state.

That education is a necessary instrument for promoting the political welfare of the state was a view much more commonly expressed than any other. In the records of the 37 constitutional conventions examined, 336 statements were found which reflected the opinions of individual members on the problem of the function of public education. One hundred ninety-eight of these were in support of the first of the views just cited; 46 supported the second; 32 the third; and 60 the fourth.

EDUCATION AND THE SAFETY OF THE STATE

In the early constitutional conventitons, it was recalled that America was experimenting with a new idea in government. A government had been set up that gave to the people more extensive rights and privileges with their resulting duties and obligations, than any government had ever given them before. It was repeatedly declared that the safety of the state is dependent upon the use the people make of these rights and privileges and upon the manner in which they perform their duties and obligations. Some types of government may exist without an educated citizenry; in fact, some are dependent upon an uneducated populace for their very existence, but these types are not in the same category with the one established in the United States. It was pointed out that this is a free, democratic government, a government of the people, by the people. Government is

left in the hands of the people themselves. The result of this governmental experiment depends upon the manner in which the people use the powers granted them. Many of the speakers in the various conventions thought that the manner in which the people make use of their powers will be determined by the extent to which they are trained or educated.

In the American form of government, it was contended, leaders and statesmen must be made; they are not born. Someone must be responsible for their making. This matter can not be left to chance or to private agencies which might give future citizens subversive ideas. If the future citizens are to be prepared adequately for their duties and responsibilities, the government itself — the state — must perform this task. Every youth is a potential leader. Therefore, the state must educate all if it is to profit to the utmost from the native ability of its citizens. All can not be leaders; some must be followers. To the followers, however, is given the biggest task of all—the selection of the leaders and the determination of policies. If the stability of the government is to be maintained, education for all at the expense of the state is required. This was the line of reasoning followed by many of the exponents of the early free, public, tax-supported schools.

It was argued that free public schools are the very foundation of a republican form of government. An enlightened state of society is prerequisite to the stability of social institutions. An uneducated man may be suppressed by tyrants or led astray by the wiles of demagogues, but not so the educated man. Education provides the means of defense and self preservation; it preserves human freedom and liberty; it preserves the safety, peace, dignity, prosperity, and honor of the state. In short, education acts as the cure for the thousand ills that grow up in every nation. It is the cement that holds society together and keeps the state from crumbling apart.

Many of the constitution makers were very specific in pointing out the relationship existing between education

and the state. For example, it was argued by some that free, state-supported schools are necessary for the purpose of developing leaders. Sovereignty belongs to the people. They are to elect their leaders from among themselves. It is necessary to develop leaders if the government is to be perpetuated. Every child is a potential statesman. Therefore, it was argued that all must be trained to act as leaders in case they should sometime be given that opportunity. It is necessary that rich and poor alike be given this training, because in a democracy the poor have as much chance of gaining the coveted heights as do the rich. The only institution that can train all persons is the public school.

Private schools, in the early days, were not accessible to all because of distance and because of economic conditions. Besides, at that time it was generally felt that private educational agencies are not to be trusted too completely, since their aims may become antagonistic to the aims of education required in a democracy. If private agencies are not to be trusted, then it was argued that the state must take over the task of educating the children. This results in discovering and training the abilities of all.

The stability of a democratic form of government is not dependent upon leaders alone. It is dependent, to a certain extent, upon the character of its citizenry. Therefore, it was argued that the education of all future citizens is necessary for the perpetuity of the government. It fits them for the duties of citizenship and life. It trains them to understand the machinery of government; it teaches them how to make proper laws; it helps them to understand the laws; it informs them as to the qualities to be sought in leaders. In short, education is necessary to prepare the children for the battles of life and the duties of citizenship in a self-governing state. At the same time it develops those attitudes and ideals in the individual which make it impossible for him to be misled by demagogues and oppressed by tyrants, and consequently the safety and perpetuity of the state is doubly insured. The educated man, it was argued, thinks for himself, but the uneducated man must

rely upon what others tell him. He is likely to be misled and may become the tool of demagogues. He must be educated to guard himself and to guard society.

It was contended that if a democratic form of government is to continue to exist, the population must become as homogeneous as possible. In other words, it was argued that social democracy is essential to political democracy. Aristocracies are dependent for their existence upon the stratification of society into classes. Democracies, however, are dependent upon individual equality. It was contended that all men, at least all white men, are born free and equal. This concept of social democracy came into existence at the time of the birth of this nation but sprang into maturity during the period of Jacksonian democracy. Any influence tending to make for any sort of classes or groups was looked upon with fear. Two such influences were wealth and religion. Some felt that wealth and intelligence on the one hand were arrayed against poverty and ignorance on the other. Others felt that Catholicism was arrayed against Protestantism. Men were fearful that these class antagonisms would imperil the existence of the state itself. The state has the power to protect its existence and to reconcile opposing classes. Many felt that the public school alone, of all the agencies at the state's command, has the power to serve this end, and to build up a population that is homogeneous.

The constitution makers were interested in the preservation and safety of the state. This was of utmost concern. They were willing to go to almost any length to secure it. Education by the state was seized upon as the instrument that secures and guarantees the state's continued existence. Education, it was felt, does this and in addition goes one step further and provides for political progress and development.

To guarantee continued existence any institution must move forward and progress. This progress in the development of a democratic form of government is dependent upon the mental development of the people. Only as they be-

come possessed of such ideals and attitudes as patriotism, virtue, mutual understanding and peace, culture, and refinement, can the state move forward. It was felt that a system of public, free, tax-supported schools alone develops these ideals.

EDUCATION AND THE ECONOMIC WELL-BEING OF THE STATE

It has already been shown that many of the constitution makers viewed education as necessary to the safety and very existence of the state. At the same time, many looked upon education as necessary to the economic well-being of the state.

The state is interested in its own prosperity and has the right to take any legitimate step to promote its prosperity. Following this line of reasoning, many of the delegates to the constitutional conventions regarded the establishment and support of free, public, tax-supported schools by the state as necessary. They argued that the education of the child is essential to the prosperity of the state.

It was shown that there are several ways in which education makes for the prosperity of the state. In the first place, education was considered as essential to the making of discoveries and inventions. These are the products of intelligent and educated minds and represent a part of the national wealth. If progress is to be made, discoveries and inventions must take place. Without them the state must remain poor, but with them prosperity will ensue. Likewise, if the state is to become prosperous, commerce, manufacturing, trade and agriculture must be encouraged. The best means of encouraging these activities is by the establishment of free, public, tax-supported schools.

It was also argued that education makes for the economic well-being of the state by attracting immigrants and capital to the state. It was pointed out that one of the best ways to encourage immigration is to establish a system of free schools. Likewise, such a system will encourage the migration of capital.

It was also pointed out that education makes for

economy in the state. Ignorance was held to be idle, uneconomical, and unthrifty. It was argued that educated labor is much more productive than uneducated labor. An educated laborer not only produces more goods, but he produces goods of a better quality. The educated laborer makes for the economic well-being of the state, whereas the uneducated laborer is a hindrance. Education makes for skilled laborers and artisans, who, it was felt, are necessary to promote the prosperity and economic well-being of the state.

Then, too, it was argued that it is more economical to establish and support schools than not to, because it is cheaper to provide educational facilities than to support penitentiaries and almshouses. It was pointed out that ignorance breeds idleness and vice, whereas education breeds thrift and virtue. The ignorant man, it was said, is likely to commit crimes and is likely to need financial assistance in his declining days. This state of affairs can be prevented by public education.

Education was regarded by many as essential to the economic well-being of the state. It was held that education opens the avenues of industry and in so doing creates wealth in the state. So, by taxing wealth to support free schools, wealth is created in excess of the amount used for educational purposes. Education also makes for governmental economy, because the cost of government over an educated citizenry is said to be less than that over an uneducated people.

EDUCATION AND SOCIAL PROGRESS

It has already been shown that public education was regarded as necessary to the safety and perpetuity of the state and as essential to the economic well-being of the state. It was also regarded as the most effective agency in eliminating such social evils as pauperism and crime. To promote its own welfare, the state must establish penitentiaries and almshouses. It must segregate its criminals and provide for its paupers. The problem of eliminating these social evils,

crime and pauperism, is a matter of major concern to the state. Because of the nature of sovereignty, the state has the right to set up any agencies it desires that will assist in the solution of this problem. Many of the delegates to the various constitutional conventions held that of all the agencies at the disposal of the state, the free, public, tax-supported school is the most effective for this purpose.

It is quite evident that education was looked upon as a means of solving some of the social problems which confronted the state. It was argued that the state should establish and support free public schools because the education of the people offers the solution of these problems. Thus, it is seen that the maintenance of a system of public education was looked upon as a function of the state, because it was thought to be essential to social progress.

EDUCATION AND THE WELL-BEING OF THE INDIVIDUAL

It has been shown that many of the delegates to the various constitutional conventions looked upon education as a function of the state. They considered the authority of the state to maintain and support public, free schools as an attribute of its sovereignty. They felt that the education of its citizens is essential to the state's political, economic, and social well-being. There were a few delegates, however, who, although they regarded the authority to maintain a system of education as being inherent in the nature of the state, held that the right to an education is inherent in the rights of the individual. They felt that the right to an education is a natural right of the child, and that it is the duty of the state to educate individuals for their own welfare as well as for the welfare of the state. They looked upon public, free, tax-supported schools as a gift from the state to the individual. Those entertaining this view were in the minority. Whereas 276 statements were found that indicated that their authors looked upon education as essential to the welfare of the state, only sixty were found which indicated that their authors looked upon it as a gift from the state. It was argued that the government owes every child

an education. Many, if not most, of those who looked upon the education of the individual as an obligation of the state to the individual also regarded the education of the people as essential to the welfare of the state. The two views were easily reconciled. Neither is antagonistic to the other. This twofold view of the matter was expressed by several of the speakers in the various constitutional conventions.

Public education was looked upon as a charity by some members of the conventions. They felt that it is the duty of the state to provide schools for those who can not afford to get an education otherwise. Poverty was not uncommon in the nineteenth century, and many children would have been prevented from attending schools had tuition fees been charged. The political philosophy of the group who looked upon education as a charity led them to believe that the poor had a special claim upon the state as the mother of all children. Therefore, they argued that the state should provide education free to all at public expense. There were those, however, who expressly stated that education is not to be considered as a charity but as a privilege.

This conception of education—that it is not a charity but an obligation on the part of the state—was entertained by the majority of the delegates in the various constitutional conventions. Nevertheless, there was a small minority indoctrinated by a theory of government opposed to this conception. It should be said that they did not deny the proposition that education is a function of the state but that they enlarged upon it. Most of them would have admitted that the state should support free schools in order to promote its own well-being, but they would have added that the state should do it for the well-being of the individual.

EDUCATION AS A PRIVATE AND NOT A STATE FUNCTION

It was argued in the constitutional conventions, as has already been shown, that education is a function of the state because it is essential to the political, economic, and social well-being of the state, and because it is essential to the well-being of the individuals who comprise the state.

It should be pointed out, however, that there were a few who did not look upon education as a function of the state. This group was so small that it exerted little if any influence. Three hundred thirty-six statements were found favoring the establishment of state supported schools, while only four were found which opposed the establishment of such schools. These four statements were found in the reports of the Kentucky convention of 1849 and the Ohio convention of 1874. In these conventions public education seems to have been opposed on religious grounds.

THE LIMITS OF THE STATE'S EDUCATIONAL PROGRAM

From the foregoing discussion it is apparent that little opposition was voiced in the constitutional conventions to the general principle of the state's responsibility for providing education free to the masses. Considerable difference of opinion arose, however, with respect to the limit to which the state should go in providing an educational system.

It may be said that there were two distinct views concerning the amount of education to be furnished free by the state. Some felt that the state's responsibility should cease with the offering of the common branches, while others felt that the state should also furnish higher education free to all. Those favoring the first view felt that the amount of education furnished through the medium of the so-called common branches is sufficient to guarantee the realization of the purpose the state has in mind in furnishing education free to all. Others, however, felt that the amount of education provided by the common branches is not sufficient to guarantee the attainment of the ends the state has in mind. They felt that the state should also furnish higher education free to all.

It is apparent that some of those who would not limit the state's responsibility for education, looked upon the provision of education by the state as a charity, even though they recognized that public education is essential to the welfare of the state.

SUMMARY

A study of the debates of the constitutional conventions of the states reveals the fact that a great majority of the delegates of these conventions felt that it is the duty of the state to establish and maintain a system of public schools for the purpose of educating its citizens. This view of the matter was justified on the following grounds: (1) in a democracy the safety and existence of the state depends upon the education of the people; (2) education is essential to the economic well-being of the state; (3) a system of public schools is the most effective agency at the disposal of the state for the elimination of such social evils as crime and pauperism; (4) the education of the child is a natural right of the individual, and it is the duty of the state to educate children for their own welfare as well as for the welfare of the state. Only a very few delegates looked upon education as a private duty and felt that the state should make no attempt to educate its citizens.

There was considerable difference of opinion among the delegates relative to the extent or amount of education to be provided free by the state. Some felt that the state's responsibility ceases with the offering of the common school branches, because they believed that such an education is all that is essential to the development of the requisite type of citizenship. Others, however, felt that the offering, by the state, of higher education is essential to the development of the highest type of citizenship.

PART II

COURT DECISIONS



CHAPTER II

JUDICIAL INTERPRETATION OF THE RELATION OF THE STATE TO EDUCATION

The courts have frequently found it necessary to define the relationship existing between the public schools and the state. As a result, they have formulated a theory of education based upon fundamental principles of public policy. This theory holds that education is a function of the state.

THE MAINTENANCE OF A SCHOOL SYSTEM AS AN ATTRIBUTE OF SOVEREIGNTY

Government, because it is government, has certain attributes. Among these are: (1) the power to levy and collect taxes; (2) the police power; (3) the power to maintain military forces; and (4) the power to administer justice. All of these attributes of government grow out of the fact that the function of government is to promote the welfare, good order, and peace of society. The courts of this country have held that the power to tax for the purpose of maintaining schools for the public is as much an attribute of government as is the power to administer justice (407), the right to exercise police power (409), or the right to maintain military forces (7, 191). In other words, the power to tax to maintain public schools is an attribute of sovereignty, and as such is coordinate with the powers just named as well as with the power to establish a state system of highways (409), and the power to maintain a penal system (409).

It has been held that this power with reference to education is coordinate with the police power. It has also been held that is not necessarily coordinate with but is identi-

fied with the police power; that is, it is a part of the police power. Both of these views are sound. The term police power used in the most general sense practically becomes synonymous with sovereignty and, in a way, becomes the only attribute of sovereignty. The power to maintain military forces, the power to tax, or the power to administer justice may be identified with the police power in the same sense that the power to provide for education is here identified with the police power. This general concept of police power has been accepted by some courts. It is illustrated by the following quotation from an opinion of the United States Supreme Court (13):

They [police powers] are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And, whether a State possesses a quarantine law, or a law to punish offences or to establish courts of practice, or requiring certain instruments to be recorded, or to regulate commerce within its limits, in every state it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates. . . .

When used in the narrow sense, police power may be considered as merely one of the attributes of government, others of which are the power to levy and collect taxes, the power to raise troops, and the power to administer justice. This concept of police power has been explained by the Supreme Court of Indiana (146) in the following words:

Police power . . . does not [necessarily] refer to that power in the broad and comprehensive sense in which it is sometimes used, which includes almost the entire scope of legislation, having for its purpose the general well-being and happiness of society and almost every function of civil government. . . . As so used, it is generally limited to the exercise of that power for the protection of peace, public safety, and public morals.

It seems that this is the most satisfactory concept of police power, because it tends to provide for a clearer understanding of sovereignty by permitting other powers to be considered as of equal importance with, rather than subordinated to, the police power. In either case, however, the

theory generally accepted by the courts—that education is a function of the state—is not affected. In both cases, the power of the state to maintain schools is an attribute of sovereignty.

EDUCATION AND THE STATE

Following this same line of reasoning, that the power necessary to provide for the welfare, good order, and peace of society at large is inherent in the state because of its nature, courts have been consistent in their interpretation that education is a function of the state on the ground that education is necessary to public safety and welfare, and on the further ground that it is a matter of state economy (54, 67, 221, 269, 304, 360, 428) because “it costs the public much more to support one ignorant or vicious person than to educate many children” (75).

Inherent in every government, as in every individual, is the right of self-protection or self-preservation. The state has the right to take those steps that are necessary to secure and protect itself. On the ground that the people must be enlightened if they are to be capable of self government, the courts have been consistent in rendering decisions to the effect that the state has the power to levy a tax for the maintenance of schools in order to insure its own self-preservation and political integrity (67, 186, 214, 221, 227, 302, 304, 310, 349, 360, 406, 426). The Supreme Court of Louisiana (214) has summarized this idea very well:

Education is one of the functions of government; and the public school system is a department of the government. Education insures domestic tranquility, provides for the common defense, promotes the general welfare, and it secures the blessings of liberty to ourselves and our posterity.

Education and the individual.—Enough cases have been cited to show that the courts regard education as a function of the state. The courts never have lost sight of this public character of education. The public school is not to be considered, primarily, as a service to the individual pupil, or as a charitable or philanthropic institution, but as a

service to the community for the benefit of the state.

An Illinois decision (130), in discussing the relation of the public school to the individual, points out that public education, although beneficial to the individual is "not undertaken from philanthropic or charitable motives, but for the protection, safety, and welfare of the citizens of the state in the interest of good government."

Education and the local community.—In support of the theory of education advanced here, that education is a state function, it has been held that education is not a local matter (46, 48, 226, 360) and that school districts, being independent public corporations, are not a part of municipal governments (51, 53, 110, 192, 193, 292, 294, 296, 297, 360, 406, 423, 444). This point of view will be discussed in detail in a later chapter.

Apparent exceptions to the general rule.—A different theory of the relationship of education to the state has been held in a few cases, however. For example, a Utah court held that education was a local function (420).

This case does not represent the best legal opinion concerning the relation of the state to education, and has not been followed by other courts to any great extent at least. The reasons for this are given in the case of *Miller v. Korns* (360). The plaintiff, in his argument, cited the Utah case just mentioned. In referring to this case, the court said:

The Bromley case . . . , is far from being decisive upon the law. That holding arose under the territorial government of Utah. It was made at a time when the organic act of the territory, far from giving the Legislature such a definite mandate with regard to schools as is laid down in our Constitution, said not one word as to the power of the Legislature to provide for common schools.

It has also been held that education is a municipal affair of municipal interest to the state (29, 52, 59, 80). The cases so holding do not deny that education is a function or an affair of the state. They admit it, but at the same time they hold that it is also a local affair or function. This point of view is expressly stated in a Tennessee case (408).

Another Tennessee case referred to the matter of education as being both a state and a local function (410). At the same time it pointed out that education was a function of the state and showed the fallacy in the belief that education is a local function exclusively. Another Tennessee case—an earlier one—held, however, that the maintenance of schools was a legitimate function of a municipal corporation (404). The fallacy in the reasoning in this case is obvious. The court speaks of education as essential to the preservation of the state and in the next sentence assigns education to a place among the functions of the municipal government. Undoubtedly the court was confused and assigned education to the position it did because the local government had been given the responsibility for maintaining schools by the state legislature.

SUMMARY

The courts, today, are agreed that education is a function of the state and not of municipal government. They argue that the power to tax for the purpose of maintaining schools for the public is as much an attribute of government as is the power to administer justice, the right to exercise police power, or the right to maintain military forces. These powers, including the power to maintain and support public schools, are inherent in the state because of the very nature of the state. The state has the right to take those steps necessary to secure and protect itself. It educates its people in order to provide for its own self-protection and self-preservation. Thus, it is apparent that the system of education provided by the state is not to be considered as a service to the individual, or as a charitable or philanthropic service, but as a service to the community for the benefit of the state.

A few courts, in an earlier period, held a different view of the relationship of the state to education. They looked upon education as a function of the municipality as well as of the state. These courts have since reversed their decisions.

CHAPTER III

THE STATE AND THE ADMINISTRATION OF EDUCATION

It has already been shown that the power of the state to establish and maintain public schools is inherent in the state's sovereignty. The state, because it is a state, has the power to provide for its own safety and well-being. Therefore, it establishes and maintains public schools.

A study of the decisions of some of the cases that have arisen out of practical problems of school administration will reveal the applications which the courts have made of the concept of education as a state function. The implication of this general concept of education as a state function is not well understood by many. Consequently, numerous cases have arisen in which the authority to administer public education by the state, acting through its legislative body, has been disputed. For the purpose of this chapter, the decisions rendered in some of these cases have been examined with the idea of developing principles of law relating to this general concept of education. Before examining these principles in detail, however, it will be necessary to inquire into the nature of the powers inherent in the legislature.

POWERS INHERENT IN THE LEGISLATURE

The will of the state concerning education is expressed in the constitution and by the legislature. The constitution is the organic law of the state and controls the actions of the legislature. The legislature does not, however, look to the constitution for an enumeration of the powers conferred upon it. Instead, it looks there only for restraints upon its power (1, 7, 54, 64, 146, 241, 269, 313, 384, 403, 430). This

is a general rule of constitutional construction and has been adopted by all courts.

An opposite rule is followed by the courts in construing the powers of congress. This rule was explained by the Supreme Court of New Jersey in the case of *Trustees of Rutgers College et al. v. Morgan*, wherein it was said (313):

The facilities for education are to be provided by the Legislature, subject to constitutional restraints.

The government of the United States was formed with enumerate powers, and therefore, to support the power of Congress, we must find in the Federal Constitution a grant of power broad enough to embrace the power exercised, but the power of a state legislature cannot be denied unless we find in the constitution of the United States or of the state that it is prohibited. . . .

A power must be found to be given in the former case; a restraint must be expressed in the latter case.

The primary source of governmental power is the people (241, 370, 384, 409) who establish the constitution and elect the legislature which, in the absence of constitutional restrictions, has unlimited discretion (7), is vested with the whole of the legislative power (7, 403, 430), and may enact any law it desires (370, 430) dealing with any subject within the scope of civil government (54, 60, 64). There is but one restriction placed upon this power to legislate in the case of matters included within the police power of the state. Concerning this restriction it has been said (146):

A wise policy of the law forbids the legislative body to divest itself of the power to legislate for the preservation of the public safety, the public health, the public morals and the prevention of crime for the reason that these things are so essentially necessary to the best interest of social organization as to require that legislative power over such subjects should be constantly retained.

AUTHORITY OF THE LEGISLATURE TO LEGISLATE CONCERNING EDUCATION

It is clear from what has been said that the legislature has power to enact legislation concerning those matters over which the state has control. Education has been shown to be such a matter (38, 39, 67, 91, 100, 161, 184,

217, 290, 302, 313, 406, 407, 439). In the control of education, then, the legislature is the source of power (161, 409), and its power is full and complete unless restricted by the state or federal constitution (38, 39, 184, 217, 246, 269, 399). It may enact any law it sees fit with regard to education which is not expressly forbidden by the state or federal constitution. It may provide for the organization of a public school system for the state. In so doing it may set up any type of machinery it desires, and in setting up machinery it is not precluded from making any subsequent changes that it may deem necessary. It may divide the state into districts for the purpose of administering education, or it may retain complete control itself. It may create districts from which it follows that it may subsequently abolish these districts or change their boundaries as it sees fit. In other words, the power of the legislature with regard to the administration of education within its confines is complete, because education is a function of the state. It need not find some other source of power for its actions. It, itself, is the source of power in matters of legislation concerning education (54, 217, 246, 260).

Rules for construing constitutional enactments concerning education.—The power of the legislature to provide for education has been shown to be complete. In many of the constitutions the states have given the legislatures the general power of providing for a system of education. The power of the legislature to provide for high schools, kindergartens, and schools of higher education under such a general grant of power has often been questioned. The courts have unanimously decided that the legislature has such power. According to the general rule, the legislature has plenary power over education except as its powers have been restricted by constitutional provision. The restriction must be expressly stated and cannot be implied from a general grant of power. In other words, constitutional provisions, unless they expressly restrict the legislature, must be considered as mandatory only and not restrictive. Such a general grant of power as that in question, merely makes

it compulsory that the legislature perform a certain act, and in no way restricts it concerning the means to be used in so doing (64, 384).

The legislature and the courts.—The legislature, in the exercise of its discretion relative to education, is supreme, subject only to constitutional limitations and its judgment is not subject to the review of the courts (67, 107, 109, 110, 158, 207, 269, 290, 439). A Minnesota court has expressed this rule as follows (269):

With the wisdom or policy of the statute under consideration courts have rightfully no concern. The remedy for injudicious legislation rests with the legislature where, it is supposed, it may be more safely left than with the courts, mainly because of the corrective influence which the people constantly exercise through frequent elections over that department of their government. To the judiciary belongs the more restricted duty of passing upon the validity of legislative enactments, as being within or without the boundaries assigned to the law-making power by constitutional law.

AUTHORITY OF THE LEGISLATURE TO CREATE AND CONTROL AGENCIES OF SCHOOL ADMINISTRATION

From the foregoing discussion, it is clear that education is under the control of the legislature except as that body is restricted in its actions by the state and federal constitutions. It is practically impossible, however, for the legislature to administer the school system of the state directly. It must employ agencies to carry out its policies and to act for it. In the absence of constitutional restrictions to the contrary, the legislature may select or create any such agencies it desires (2, 36, 37, 71, 72, 191). The legislature may authorize or even require municipal corporations, such as cities and villages, or quasi-municipal corporations, such as counties and townships, to perform certain duties with respect to establishing, maintaining, and supporting schools; or it may create new governmental agencies whose sole purposes are to administer education within their own boundaries (252).

Authority of legislature over agencies it creates.—

The power of the legislature over the agencies it desires to use is supreme, and it can compel them to perform the educational duties it delegates to them (184, 325, 409). In this connection the courts have required local units to support schools even when the people were opposed (184, 409). Likewise, the courts have upheld the action of the state superintendent of public instruction in opening schools that had been kept closed by a local school board because of disagreement (325).

It should be remembered that the state need not create school districts or other local units of administration if it does not so desire. The state is a unit and its authority over schools and school districts is not necessarily distributive (161).

In this connection, it should be pointed out that the power of the legislature is supreme and that "The legislature having tried one plan, is not precluded from trying another. It has a choice of methods, and may change its plans as often as it deems necessary or expedient" (161). Thus, it is clear that the state, by delegating powers to the school districts, does not relinquish its control over the school system of the state. The power to create districts is inherent in the legislature (36, 39, 49, 54, 72, 107, 109, 110, 116, 184, 242, 268, 303, 368, 399, 439). The legislature may also abolish (36, 268, 303, 368, 405, 418) or change the boundaries of school districts (36, 38, 39, 40, 49, 72, 103, 242, 268, 368, 399, 418) for any reason satisfactory to it (36) without the assent of the people residing in the district (36, 368, 418). The legislature may perform this power itself, or it may delegate it to such agencies as it desires (36, 49, 84, 299, 368).

In connection with the right of the legislature to delegate certain authority to subordinate agencies, it should be noted that it is a generally accepted principle of law that the legislature cannot delegate legislative authority (88, 90, 106, 113, 132). Nevertheless, this does not prevent the legislature from creating administrative bodies and clothing them with powers involving the exercise of discretion. It

is often difficult, however, to distinguish between legislative and administrative powers, and as a result, cases involving the right of administrative officials to exercise discretion have frequently come into the courts.

In this discussion of the power of the legislature to create school districts, one limitation should be pointed out. The legislature cannot create districts in such a manner that two or more occupy the same territory at the same time, for the same purpose (34, 89, 97, 115, 119, 120, 125, 126, 127, 137, 138, 139, 375). It has been held, however, that a high school district may be superimposed upon several elementary school districts even though each of these elementary school districts has the authority to support a high school (127). As yet, however, no case has been decided concerning the right to establish a high school district with boundaries coterminous with those of a common school district. If the common school district had only the right to maintain an elementary school there is no reason to suppose that the courts would not permit the same territory to be organized into a high school district also. If, however, the common school district was already maintaining a high school the conditions would be somewhat altered.

AUTHORITY OF THE LEGISLATURE TO
ALTER SCHOOL DISTRICT BOUNDARIES AND
TO APPORTION ASSETS AND LIABILITIES

It has already been pointed out that, because education is a function of the state, the legislature has plenary power over it. It may legislate in all matters concerning education unless expressly prohibited from so doing by the state or federal constitution. It may set up the machinery for administering education, and it may change this machinery whenever it so desires. It may create school districts, and it may abolish districts or amend their boundaries at pleasure. With regard to such matters the legislature is the source of its own power, and that power is complete.

Whenever the legislature changes the boundaries of school districts, the question of the division of the assets and

liabilities of the old district arises. Schools are state institutions, and it follows that their property is state property and not corporate property. Therefore, the legislature may make any provision for the division of school property that it deems just and equitable (38, 49, 268, 399).

The rule for distributing the assets and liabilities in the absence of any statutory provision on the subject has been laid down as follows: "When the act of segregation is silent as to the common property, and common debts, the old corporation retains all the property within its new boundaries, and is charged with the payment of all debts" (50).

A different rule was followed by the court in the case of *City of Winona v. School District No. 82* (268). In this case, instead of following the general rule and holding that in case of segregation the property belonged to the district in which it was located, the court gave possession of it to the original district. This decision does not seem to represent the best law, and it has been criticised by other courts (58).

In any case where the legislature does not make the segregated section of the old district responsible for part of the debts of the old district in specific terms, no action can be maintained against the segregated section for the collection of this indebtedness (399).

SUMMARY

The right to maintain and support a system of public schools is inherent in the state. It grows out of the very nature of sovereignty. The will of the state concerning education finds expression in one or both of two sources: the constitution and the legislature. The constitution is the organic law of the state and controls the actions of the legislature. The legislature is a free agent in exercising legislative powers except as it has been limited by the state constitution. In the exercise of its discretion relative to matters of education, the legislature is supreme, and its judgment is not subject to the review of the courts.

The power of the legislature with regard to the administration of education within the confines of the state is complete, because education is a function of the state. The legislature need not find some source of power for its actions. It, itself, is the source of power in matters of legislation affecting education.

The legislature may administer the public school system of the state directly, or it may employ agencies to assist it in carrying out its policies. In the absence of constitutional restrictions to the contrary it may select or create any such agencies it desires. It may authorize existing municipal corporations such as cities and incorporated villages, or quasi-municipal corporations such as counties and townships, to perform certain duties with respect to establishing, maintaining, and supporting schools; or it may create new governmental agencies known as school districts for the sole purpose of administering education within their own boundaries. The power of the legislature over agencies it desires to use is supreme and it may compel them to perform the educational duties it delegates to them. In creating school districts and in delegating to them these powers, the legislature cannot be considered to have relinquished its control over the school system of the state. It may abolish or change the boundaries of a school district for any reason satisfactory to it, either with or without the assent of the people residing in the district. Whenever the legislature alters the boundaries of a school district the question of the disposition to be made of the assets and liabilities of the old district arises. Schools are state institutions and it follows that their property is state property. Therefore, the legislature may make any provision for the division of school property that it deems just and equitable.

There is but one restriction upon the power of the legislature to delegate authority to subordinate agencies; that is, it cannot delegate legislative authority. It cannot strip itself of its own power to legislate. It may, however, create administrative bodies and clothe them with powers involving discretion.

Likewise, there is one limitation on the power of the legislature to create school districts. It cannot create districts in such a manner that two or more occupy the same territory at the same time for the same purpose.

CHAPTER IV

THE NATURE OF THE STATE'S AGENCIES IN ADMINISTERING EDUCATION

The state may exercise its authority to maintain and operate schools itself, or it may delegate such authority to existing municipal or quasi-municipal corporations such as counties and townships, or it may create quasi-corporations for the sole purpose of administering educational matters within their own boundaries. In order to understand the scheme of administering education that is employed by the various states in this country it is necessary to understand the legal nature of municipal and quasi-municipal corporations.

THE NATURE OF MUNICIPAL CORPORATIONS

The term "municipal corporation" is used in two different senses. In the most general sense the term is used to refer to all public corporations. In its narrower and more correct sense it is used to refer to such public corporations as incorporated cities and villages only. In this sense, a municipal corporation may be considered as a legal entity (77, 78, 79), a body politic and corporate (9, 365), "embodying the elements (a) designated territory, (b) the inhabitants within the same, and (c) the existence of governmental powers conferred and to be exercised for the public benefit, . . . " (346). It is a voluntary corporation (137, 149, 168, 359, 411), created by charter (24, 51, 53, 78, 445), granted by sovereign power—the legislature (6, 8, 26, 27, 59, 70, 190, 365, 429, 437, 445), which has plenary power over it (30, 41). It possesses attributes of sovereignty that have been delegated to it by the legislative department of government (117, 228, 333) and so is able to perform its main function, that of local self-government (77, 79, 96, 134, 181, 346, 391).

Municipal corporations and the state.—Thus it is seen that a municipal corporation is a voluntary corporation. It is set up by the legislature at the request of the locality for the purpose of caring for local corporate affairs. It is purely a local corporation performing local functions. Intrinsically, it is no part of state government. Hence it has no implied powers of a strictly governmental nature.

The state itself has no interest in the creation of municipal corporations. It does not care whether or not they exist. It merely creates them to satisfy local demands, those of local self-government. The state could get along very well without municipal corporations, because, as has been said, they are not created for the purpose of performing governmental functions. It should be understood, however, that the state may, if it so desires, expressly assign to municipal corporations certain functions of a public or governmental nature. The fact that the state creates municipal corporations, however, does not endow these corporations with any implied powers of a strictly governmental nature. They are local agencies created by the state for local purposes.

The state that creates a municipal corporation has plenary power over it and may delegate to it certain powers of a governmental nature thus making it, in some respects, an agency of the state for governmental purposes (6, 8, 10, 14, 18, 19, 24, 25, 26, 59, 70, 76, 95, 146, 204, 334, 346, 365, 370, 377, 378, 429, 436). In this respect it is a subordinate or political subdivision of the state (17, 27, 41, 56, 437), a branch of the state government (26, 59), and governs for the state (26, 95). It should not be forgotten, however, that the main function of the municipal corporation is that of local self-government.

The Supreme Court of Arkansas has explained the nature of a municipal corporation very clearly in the case of *Memphis Trust Co. v. St. Francis Levee District* (35). It says:

Now, while every municipality is a public corporation, yet every public corporation is not a municipality, for, as defined above, a municipality is not only a public corporation; it is such a corporation created for governmental purposes, and having, to a large extent, local powers of legislation and self-government. An incorporated levee district, created for the sole purpose of constructing and maintaining a levee, is, like a municipality, a public corporation; but in respect to powers of self-government and legislation it falls far short, and in that regard is clearly distinguished from a municipality, such as an incorporated town or city. These are, to a certain extent, miniature governments, having legislative, executive and judicial powers;

The courts have often recognized the distinction between municipal corporations, and these inferior corporations, such as levee districts, school districts, and the like. . . .

The municipality is a child of the legislature created for purposes of local self-government. The state may, however, require it to perform certain powers of a governmental nature. When the state makes such a requirement, the municipality, in carrying out the thing required, acts as an agent of the state. Its main purpose, that of exercising political power of a local or corporate nature, must not be lost sight of, however. Very often these two functions or purposes of a municipality are confused, and suits at law result.

Education is a state function, but the state frequently confers the power to administer education upon the municipality. Therefore education is often regarded as a corporate function by the municipality. Such is not the case, however. The municipality merely acts as the agent of the state in such cases. Then, too, the municipality often attempts to exercise powers over education when such have not been granted to it by the state. It fails to realize the implications of the general concept of education as a state and not a corporate function. In order to arrive at an understanding of the limited control which a municipality may exercise over education it will be necessary to understand the nature of the powers of municipal corporations.

Powers possessed by municipal corporations.—A municipal corporation is created by its charter which is granted to it by the legislature. It follows that the only

powers which municipal corporations have are those that are expressed or implied in their charters, or in the general statutes of the state (9, 14, 15, 19, 59, 77, 78, 146, 167, 170, 365, 369, 429, 437). A third class of powers has sometimes been attributed to municipal corporations (68, 146, 147, 167, 267, 318, 369, 432). This class consists of delegated powers and includes those that grow out of the purpose for which the municipal corporation was created and those which are essential to the accomplishment of the objects of its creation. They are, in reality, implied powers, but because of their nature they are worthy of special attention. The matter of determining whether or not the powers exercised by a municipality fall in this category is one for the courts to decide.

THE NATURE OF QUASI-MUNICIPAL CORPORATIONS

There are many public bodies which are not municipal corporations in the strict sense of that term. They have some of the attributes of municipal corporations and are called quasi-municipal corporations, or quasi-corporations. To this group belong such bodies as school districts, counties, townships, drainage districts, and the like as well as the body or group of individuals who govern them (54, 61, 63, 66, 107, 109, 110, 114, 118, 122, 131, 149, 153, 174, 216, 242, 272, 277, 283, 297, 372, 398, 443). Constitutions and statutes often use the term "municipal corporation" in its most general sense, as referring to both municipal and quasi-municipal corporations (9, 16, 86, 139, 168, 172, 182, 201, 218, 251, 271, 282, 314, 345, 371, 376, 442). The courts, therefore, when called upon to construe the meaning of the term "municipality" are generally guided by the intent of the law-makers so far as they are able to discover it (86, 172, 182, 251, 271, 314, 345, 376, 442).

Quasi-municipal corporations are involuntary corporations (102, 109, 110, 122, 143, 152, 359, 411), created by the legislature (54, 104, 107, 109, 110, 152, 172, 183, 283, 303, 368, 372, 399, 405, 411), for the purpose of aiding in the general administration of the government (107, 109, 110,

114, 124, 143, 152, 283). They are instruments of the state and act for the state (54, 61, 63, 71, 72, 107, 133, 149, 152, 154, 165, 221, 242, 252, 283, 293, 303, 368, 373, 397, 408, 411). As a rule quasi-municipal corporations exercise public or governmental powers only (28, 61, 63, 73, 104, 107, 143, 149, 152, 165, 242, 282, 350, 354, 359, 399).

Quasi-municipal corporations, it is repeated, are involuntary corporations. They are created by the state for the purpose of assisting the state in performing the functions for which it is responsible. In the matter of education the state may act as a unit if it so desires. It has not, however, seen fit to do this in the past. In some cases it has endowed municipal corporations with the power to administer schools. In other cases it has granted this power to quasi-municipal corporations such as counties and townships. In the majority of cases, however, it has created special quasi-corporations, known as school districts, for this purpose. School districts are quasi-municipal corporations created for the purpose of assisting in the performance of this function. They are creatures of the state and have all the powers expressly granted to them and also those implied powers that are essential to the doing of that for which they were created.

Powers possessed by quasi-municipal corporations.—Quasi-municipal corporations do not derive their powers or authority from charters. Instead, they derive their authority from the general laws or statutes which have been passed by the legislature (22, 49, 51, 53, 133, 152, 183, 221, 298, 333, 372, 398, 399). Their powers are limited (402, 443) and are confined to such as are expressly conferred by statute or are necessary to enable them to perform the duties required of them by law (122, 131, 149, 153, 169, 238, 305, 397, 398, 442). The Court of Appeals of Kentucky (187) has stated the powers of quasi-municipal corporations as follows:

It is the well established rule in this and other jurisdictions that municipalities possess only such powers as are expressly conferred upon them by the constitution or statutes of the sovereignty of which

they form a part and such as are necessarily implied or incident to those expressly granted and which are indispensable to enable the municipality to carry out its declared objects, purposes, and express powers. . . .

Rules followed by the courts in determining the powers of quasi-municipal corporations.—It is often difficult to determine whether a certain power belongs to a quasi-municipal corporation or not. The difficulty arises in connection with determining just what powers are necessary to enable the corporation to perform its legal duties. The only means of deciding whether a certain power is necessary or not is by analyzing the purposes for which the corporation was created. A South Dakota decision illustrates the method used by the courts in determining whether a quasi-municipal corporation is invested with a particular power (401).

To the Legislature is given the power to create and to authorize the creation of municipal and quasi-municipal bodies through which, as governmental agencies, the public welfare is sought to be promoted; hence we have townships, towns, cities, counties and school districts. . . . Each of such agencies has a certain work to perform in the promotion of such public welfare. Necessarily incident to the creation and existence of one of these political entities is the power to provide those rules and regulations upon the proper enforcement of which depends its ability to perform the particular function for which it was created. While express legislation may give to such agency certain express police powers, it should never be held that the naming of these powers precludes it from exercising any other powers; but it should be held that upon the creation of a municipal body, it becomes possessed of all necessary and reasonable police power, and that express enactments relating to the police power of such body do not curtail the necessary and reasonable police powers of such body, except where it is clear that it was the legislative intent to so curtail them. . . .

In determining whether, in a given case, there has been a reasonable exercise of this inherent power, the court must consider the particular facts of that case; each case must stand by itself.

In attempting to determine the expressed or implied powers of a quasi-corporation, courts are guided by the following rule of statutory interpretation: Where a statute enumerates the express powers of a corporation and these

enumerated powers are followed by a general grant of power, other powers, to be implied under this general grant, must be of the same general kind as those specifically enumerated (160, 212).

With regard to the matter of powers, as far as quasi-municipal corporations are concerned, the legislature is the source of power and this power must be exercised in the mode and within the limits prescribed (49, 169, 183, 372).

Quasi-municipal corporations distinguished from municipal corporations.—It is seen from the foregoing discussion that municipal corporations and quasi-municipal corporations are similar in some respects and different in others. Both are corporations created by the same source—the legislature. The courts follow the same rules in determining the powers of each. On the other hand, municipal corporations are voluntary corporations, while quasi-municipal corporations are involuntary corporations. Municipal corporations derive their powers from their charters. Quasi-municipal corporations derive their powers from the statutes or general laws. Municipal corporations have a dual nature. They perform both public and private functions. They provide for local necessities and conveniences primarily, but at the same time they may act as agents of the state. As a rule, quasi-municipal corporations exercise powers of a governmental nature only (149, 168, 411).

In the case of *Coleman et al. v. Thurmond* the court pointed out the distinctions between municipal corporations and quasi-corporations, quoting in part from Dillon on “Municipal Corporations” (411):

There is a distinction between municipal corporations proper, such as chartered towns and cities, or towns and cities voluntarily organized under general incorporating acts, and involuntary *quasi*-corporations, such as counties. ‘Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience. On the other hand, counties are at most but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local subdivisions of the state, created

by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent or concurrent action of the people who inhabit them. . . . A *municipal corporation proper* is created mainly for the interest, advantage and convenience of the locality and its people; a *county organization* is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy.'

SUMMARY

Education is a function of the state. From this it follows that the state, acting through its legislature or its constitution, may retain unto itself the necessary authority to maintain and operate schools, or it may delegate such authority to other agencies. The agencies used by the state are two kinds, namely: municipal corporations and quasi-municipal corporations. To the first type belong cities and incorporated villages. To the latter type belong counties, townships, and school districts. To understand the scheme of educational administration employed by the state it is necessary to understand the legal nature of these two types of public corporations.

A municipal corporation is a voluntary corporation, created by charter, granted by sovereign power—the legislature—for the primary function of local self-government. It is a local corporation performing local functions. Primarily, it is no part of state government, hence it has no implied powers of a governmental nature. The state may, however, if it so desires, expressly assign to municipal corporations certain functions of a governmental or public nature. These corporations are created, however, primarily for the purpose of exercising local functions. In exercising functions of a public or governmental nature, municipal corporations act as agencies of the state.

Municipal corporations have only those powers which

are expressed or implied in their charters or in the general statutes of the state. Among the implied powers of a municipal corporation are those that grow out of the purpose for which the corporation was created and those which are essential to the accomplishment of the objects of its creation.

Quasi-municipal corporations, unlike municipal corporations, are involuntary corporations created by the legislature for the purpose of aiding in the general administration of the government. They are instruments of the state and act for the state. Generally, they exercise only public or governmental functions.

Quasi-municipal corporations derive their authority from general laws and statutes. Their powers are limited and are confined to such as are expressly conferred by statute, or are necessarily implied therein, and to those that are necessary to enable these corporations to perform the duties required of them by law.

CHAPTER V

THE STATE AND THE MUNICIPALITY IN EDUCATIONAL ADMINISTRATION

School districts and municipalities frequently occupy the same territory. They have such close relation that controversies between the two often arise. Such controversies are often the result of the lack of clear understanding of the statute, or they may result from a lack of clear understanding of the functions of the two types of municipalities. The courts have frequently been asked to rule concerning the functions of each and to define the relationship existing between the two. Consequently, well-defined legal principles defining this relationship have been developed. These principles will now be considered.

SCHOOL DISTRICTS AND MUNICIPALITIES

Education being a state function, the state may employ whatever agencies it desires to administer its educational system. It may place the schools under the control of the municipality if it so desires. Likewise it may make use of existing quasi-municipal corporations such as counties and townships by authorizing them to exercise control over the schools. As a third option, it may create those quasi-municipal corporations known as school districts for the sole purpose of assisting it in the administration of its educational program. In no sense of the word can any of these corporations be considered as having inherent control over the schools. They merely exercise delegated powers for the state. In creating new agencies, the state may create them with boundaries coterminous with those of existing municipalities, in which case the two do not merge into one corporation but remain separate entities. The school

district remains a distinct entity from that of the municipal corporation, such as a city, or a quasi-municipal corporation, such as a township, upon which it may be superimposed (51, 53, 92, 133, 192, 193, 206, 240, 252, 256, 257, 286, 289, 291, 294, 296, 315, 319, 355, 356, 444).

AUTHORITY OF THE MUNICIPALITY
TO SPEND ITS FUNDS FOR SCHOOL PURPOSES

It has been shown that school districts and municipalities are, as a rule, separate entities although they may both occupy the same territory. Likewise it has been shown that education is a state and not a municipal function. It follows, therefore, that in the absence of constitutional or statutory authority, the municipality cannot spend its funds for the maintenance of the public schools. Such is the position taken by a majority of the courts (92, 215, 289, 315, 319, 355). Undoubtedly, many cities do spend some of their funds for public school purposes illegally by furnishing the schools with free water, free lighting, and free building sites. In only a very few cities has this been complained of, however, and consequently only a limited number of cases involving this issue have come into the courts. It is generally true that the tax-payers of the city are also tax-payers of the school district. It is immaterial to them whether the water or school site is paid for out of the city or school treasury. They pay it ultimately, and the cost to them is approximately the same regardless of the governmental agency that assumes the financial responsibility. It is only when the vested interests of some individual or firm are affected that legal complications have arisen. In a number of such cases the courts have been asked to rule on the question whether the city may furnish free water to public schools. The courts have repeatedly held that it cannot (92, 289, 315). Likewise, the courts have held that the municipality proper may not levy a tax for educational purposes (215). Neither may a city make a gift of land to the use of schools (355).

On the other hand, there have been a few cases which

have held that a city may bond itself for the purpose of raising money to build school buildings, even though the city and the school district are separate corporations and the school district has the authority to bond itself for the same purpose (52, 53, 59). All these cases have arisen in California, which seems to be the only state to have made such decisions. The first of these cases (59) to hold that municipal corporations have the power to assist, at least, in the maintenance of public schools reasons as follows:

That the education of the youth is properly included within the function of a municipal government cannot be denied. A municipal corporation is but a branch of the state government, and is established for the purpose of aiding the legislature in making provision for the wants and welfare of the public within the territory for which it is organized, and it is for the legislature to determine the extent to which it will confer upon such corporation any power to aid it in the discharge of the obligation which the constitution has imposed upon itself. . . . As schoolhouses are essential aids in the promotion of education, their erection is but incidental to the maintenance of the schools, and falls as completely within the function of a municipal government as does the erection of a hospital for its indigent poor, or buildings for its fire engines; and the schoolhouses when so erected are as fully municipal buildings as are its engine houses and hospital buildings.

This line of reasoning is in conflict with that of the great majority of the courts. The municipality and school district are separate entities, each with its own characteristic functions to perform. School buildings cannot properly be considered as municipal buildings. Moreover, the reasoning of the California courts led to much confusion and may lead to injustice by permitting unreasonable taxation, made possible by allowing the same territory to be taxed for the same purpose by each of two governmental agencies.

AUTHORITY OF THE MUNICIPALITY TO CONTROL SCHOOL PROPERTY

School district and municipal boundaries are often co-terminous or practically so. When such is the case the municipality frequently attempts to exercise control or management over the property of the school district. Such

action may grow out of a lack of clear understanding of the nature of municipalities and school districts. The municipality is a creature of the state. The state creates it for the purpose of performing local functions. The municipality has only those powers which the state has expressly or impliedly granted to it. It is generally considered that a municipality has the authority to exercise police power over its own territory. In other words, the municipality may exercise police power over the property of the municipality. The majority of the courts hold, however, that the municipality, unless expressly authorized so to do, has no authority to exercise police power over the property of the state located within the confines of the municipality (57, 203, 421). The exercise of police power over state property is in the nature of a governmental function. Municipalities are not created to perform governmental functions. They are created to perform local functions. The state, in creating municipal corporations, cannot be presumed to have given them the implied power to control or govern the property of the state.

Because education is a function of the state and because schools are state agencies, it follows that school district property is as much the property of the state as is the property of a state school supported by the state at large, or an armory, or a state capitol building. Therefore, the municipality, unless expressly authorized to do so, has no authority to exercise control or management over school property (421).

The Supreme Court of California has made a decision to the contrary, however, in at least one case (57). This decision appears to have been based upon a peculiar line of reasoning. It appears to have been taken for granted that the police power over school buildings was vested in either the city or the school district. In either case the power would have been present only by implication, and, because the powers of municipal corporations are broader than those of quasi-municipal corporations, the court seems to have decided that the city had authority to exercise police power

over the school district. There seems to be a more fundamental line of reasoning; school property is state property. Therefore the state retains police power over the school district unless it has expressly delegated it to the municipality, or delegated it expressly or by implication to the school district. By the very act of creating a school district, however, the state confers upon it all police power necessary to enable it to accomplish the purpose for which it was created. This line of reasoning has been followed by other courts, but received no consideration from the California court. Then, too, the California court seems to have assumed that it is necessary for the public safety and welfare to make school districts subject to the police power of the municipality. This appears unsound. If school boards erect buildings that are unsafe or unsanitary, an action in equity may be brought against them. Thus it was said in a Utah case (421):

If, however, a school board should attempt to construct a school building of improper, unsafe, or inflammable material, or so near to another building, public or private, as to make the school building a menace or a danger to such other buildings, either the city or the owner of the building thus menaced or endangered, or any interested person, would have a speedy and adequate remedy in a court of equity to have that school building declared a nuisance and have it made safe or removed.

Other cases involving the right of the city to exercise authority over school buildings have found their way into the courts (440, 444). These cases have held that municipal officers have no power to control or manage school buildings in the absence of constitutional or statutory provisions expressly conferring such authority.

EFFECT OF CHANGING THE BOUNDARIES OF MUNICIPAL CORPORATIONS UPON THE BOUNDARIES OF SCHOOL DISTRICTS

When the boundaries of a municipality are enlarged the question often arises as to whether the boundaries of the school district of the city are also changed to include the

new territory. The general rule to be followed in the absence of constitutional or charter provisions to the contrary is that the boundaries of the school district remain unchanged (171, 247, 294).

AUTHORITY OF MUNICIPALITY TO CONTROL SCHOOL FINANCE

The legislature has been shown to have plenary power over education unless restrained by constitutional provisions. In exercising this power, it may empower the school board to levy and collect taxes and manage the financial affairs of the school district or it may delegate a part or all of this authority to the officers of the city. In any case, whenever the state intends to delegate any such authority to the city officers the statute and the charter will be the measure of the authority delegated (186, 261). Statutes often delegate to the city the power to approve the school budget. In so doing the legislature intends to give the city either ministerial or discretionary power. In the first case, the city is empowered merely to approve the budget and levy taxes (186, 260, 261). In no event does it have the power to reduce the budget if it has ministerial power only. In the second case, if the city has discretionary power with regard to school finance, it has the power to determine the amount of money required for school purposes, and can alter the budget before adopting it if it so desires (321, 322, 336). In either case, it must be remembered that the statutes govern, and that the city can exercise only such power as is granted to it by the legislature. That is to say, the city has no inherent control over school finance. When the statutes do empower the city officials to exercise discretionary power with regard to the approval of the school budget, however, they cannot be considered as giving the city authorities the right to determine how the amount in the budget shall be spent (223, 232, 321, 322, 393, 394). In other words, the city officials have the right to determine the total amount only and cannot dictate as to the specific amount to be spent for each purpose. The board of education may spend the money as it sees fit.

SUMMARY

Because education is a function of the state, the state may employ whatever agencies it desires to administer education. These agencies merely exercise delegated powers for the state. In creating new agencies the state may create them with boundaries coterminous with those of existing municipalities. In this case the two do not merge into one corporation but remain separate entities. The school district remains a distinct entity from the municipal corporation, such as a city, or from the quasi-municipal corporation, such as a township, upon which it may have been superimposed. Both may be composed of the same constituents but the management of each is distinct. Each has its own governing body and its own responsibilities and functions. It follows, therefore, that the municipality has no power or authority over the schools located within its boundaries unless the legislature has delegated this authority to it. The municipality can make no gifts to the school district, neither can it spend municipal funds for school purposes. The courts of California are the only ones that have taken a different position on this question. They permit the municipality to bond itself for the purpose of raising funds to build school buildings, even though the city and the school district are separate corporations and the school district has been granted the authority, by the legislature, to bond itself for the same purpose.

Likewise, the courts of the various states, with the exception of those of California, again, are a unit in holding that municipalities have no authority to control school property. Because education is looked upon as a function of the state, school property is considered as state property. The courts have held that school buildings are as much state buildings as are armories or state capitol buildings. Municipalities are creatures of the state. They are created for the purpose of performing corporate functions. They have only those powers expressly granted to them or delegated to them by the state. They have the authority to exercise police power over their own property but not over the prop-

erty of the state unless the state has expressly granted them the authority to exercise police power over its property.

Municipal corporations and school districts occupying the same territory are as a rule separate corporations. The change of municipal boundaries does not, therefore, affect the boundaries of the school district in the absence of constitutional or charter provisions to the contrary.

CHAPTER VI

LIABILITY OF SCHOOL DISTRICTS IN DAMAGES FOR TORT

The courts seek to apply principles of law, equity and fair-dealing to the situations which confront them. In so doing, in many cases involving school districts they are forced to resort to that fundamental concept of education, that education is a function of the state. Such is the case with regard to a certain group of cases that are about to be considered, namely, cases involving the liability of school districts in damages for tort.

A school district often acts or fails to act in such a manner as to violate the private rights of individuals. This violation of a private right is called a tort, and the appropriate remedy is a common-law action for damages. An individual and a municipality are both liable in damages for tort. A state is not. The courts in determining the liability of school districts in damages for torts consider the theory underlying public education and, as a result, their decisions are conditioned by the fact that education is a state function.

LIABILITY OF SCHOOL DISTRICTS FOR INJURIES RESULTING FROM THE NEGLIGENCE OF THEIR OFFICERS

The common-law rule is that school districts are not liable for injuries sustained by pupils and employees while they are on the school grounds even though the injuries result from acts of negligence of school officers or agents (65, 107, 152, 177, 178, 195, 248, 264, 283, 287, 347, 380, 431, 438).

Several different reasons have been assigned in support

of the common-law principle that the district is not liable for the negligent acts of its officers, agents, and employees. One of the most important of these goes back to the fundamental nature of school districts and is based upon the fact that school districts are not liable because they are instruments or agencies of the state engaged in performing public or governmental functions. The principle is well established that the state is not responsible in damages for torts it may commit. This rule of non-liability of the state for its torts had its origin in the medieval theory of the state and sovereignty. It was based on the principle that the king could do no wrong, and, in modified form, has been generally accepted by all courts in civilized countries except where statutes to the contrary have been enacted. For example, in the United States it is a generally accepted rule that in the absence of statutory or constitutional provisions to the contrary no suit may be maintained against either the United States or any of the 48 states.

Because quasi-corporations, of which school districts are one type, are governmental agencies and act for the state, this theory of non-liability has been applied to them. It has been held to apply even to the performance of those duties which are not imposed upon the district *nolens volens*, but which are voluntarily assumed by it, by permission of the state (431).

Many of the courts, in holding school districts not liable for injuries sustained by pupils and employees while on school grounds, have reasoned, as previously stated, that school districts are agents of the state and are engaged in the performance of a state function and therefore are subject to the same rule as that applied to the state. Another line of reasoning followed by some courts holds that the district is exempt from liability because it has limited powers only, which do not include the power to raise money for paying damages (152, 225, 283, 357, 389). In other words, the courts hold that school funds have been raised for a certain purpose and cannot be diverted to any other purpose. Likewise, the courts have sometimes refused to hold school

districts liable in damages for torts on the ground that to do so is against public policy (389). So, also, courts have refused to hold school districts liable for the negligent acts of their agents or employees under the rule of *respondereat superior*, on the ground that the master-servant relationship does not exist between a school district and its agents and employees (62, 337, 338, 388, 435).

New York courts and the liability of school districts for torts.—It is clear that school districts are not as a rule, held responsible by the courts in actions for damages for injuries to pupils or employees where the injuries are the result of torts growing out of the negligence of officers, agents, or employees of the school. There is but one state in which exceptions are consistently made to this common-law rule. That is the state of New York. Here, the common-law rule of non-liability applies only to the acts of the agents or employees of school boards. Boards of education are liable in their corporate capacity for injuries resulting from their own negligence (317, 324, 326, 329, 330, 331, 340, 341).

Liability for injuries received by third parties on school grounds.—In the few cases that have arisen involving the liability of school districts in damages for injuries received by third parties while on school property the courts are divided. There seems to be no reason, however, for distinguishing between pupils, employees, and the general public so far as the district's liability for negligence is concerned as long as the board is performing a governmental function (109, 230, 233, 234). If, on the other hand, the board is not performing a governmental function and a third person is injured it is possible that the district may be held liable. It is sometimes difficult to determine whether a board of education is acting in a governmental capacity. It all depends upon the place assigned the public school as a social institution. If education is conceived of as a mere matter of administering courses of study, any other use of school grounds or buildings is of a private nature. If, how-

ever, education is conceived of as a matter touching the life of the community in all possible aspects, then practically any community use to which school buildings or grounds may be put should be considered as of a governmental nature.

A few cases may serve to illustrate the judgments of the courts. In a Massachusetts case a school committee ordered a tree cut down. It fell across a public highway and injured a man at work. The court held that the district was not liable for damages because the cutting of the tree was a governmental act (233). In another Massachusetts case, a citizen, while in a public school building in Boston for the purpose of voting, was injured while descending a defective stairway. The court held that the city of Boston which owned the building was not liable in damages for the injury (234). In New York, the board of education permitted a gymnasium in a school building to be used as a community center. Among the apparatus in this gymnasium was a springboard which was defective. The board of education knew that the springboard was defective but had failed to have it repaired. A boy was injured on this springboard and brought an action to recover damages (330). The court did not go into the matter of determining whether the school board, in permitting the community center to use the building, was performing a governmental function. It held the board liable for damages, however, on the basis of the New York rule that a board is responsible for its own negligent acts.

Liability for injuries received by an invitee in cases where admission is by fee.—A slightly different situation arises, however, when a person is injured as a result of his attending some function held on school property where admission is by fee. It is often argued that when the school district permits its property to be used for such a function the district is engaged in the performance of a private and not a public function. The courts do not reason in this manner, however, and in the majority of cases refuse to permit the recovery of damages from the district under such circumstances (109).

LIABILITY OF MUNICIPALITIES FOR
INJURIES RESULTING FROM THE NEGLIGENCE
OF SCHOOL OFFICERS AND EMPLOYEES

In some instances the legislature has made the city responsible for the support of its own schools instead of creating an independent school district. In such cases the question often arises as to the responsibility of the municipality, in damages, for torts resulting from the negligent acts of school officers and employees. It should be recalled that municipalities have a dual nature. They are created, primarily, for purposes of local self-government. In performing this function their acts are considered as private and corporate. The state, however, may delegate to the municipality certain duties of a public or a governmental nature. The maintenance and operation of public schools is one of these acts. So, then, the municipality is engaged in performing both private and public duties. It is a general principle of common-law that a municipal corporation is responsible in damages for torts committed by it in the performance of acts of a private or corporate nature but is exempt from liability for the negligent performance of its governmental duties (105, 107, 114, 136, 149, 222, 395).

LIABILITY OF SCHOOL DISTRICTS AND
MUNICIPALITIES FOR TRESPASS
OR MAINTENANCE OF A NUISANCE

There is yet another class of cases involving the liability of school districts in damages. This class involves the wilful or positive misconduct of school officers in their corporate capacity. The appropriate action in such cases is an action for trespass or for maintaining a nuisance. This class of case involves the liability of school boards or school districts for damages which have resulted from active misconduct of school officers and which have been received by individuals off of school property. The courts are divided on the question of liability in such cases. Courts in some jurisdictions hold that a school board or a school district is

liable where it has maintained a nuisance or has committed an act of trespass in its corporate capacity (74, 236, 248, 249, 331, 381). There are some jurisdictions, however, in which it is held that the school board is not liable for trespass or the maintenance of a nuisance, on the ground that it is performing a governmental function. The school board, it is said, is not authorized by the state to commit a tort and when it does so it does not represent the district (32, 352).

SUMMARY

It is a common-law principle that the state, unlike an individual, cannot be held liable in damages for torts it may have committed. This rule of non-liability of the state has its origin in the medieval theory of the state and sovereignty. It is based upon the principle that the king can do no wrong. The rule of non-liability, in modified form, has been generally accepted by the courts in all civilized countries except where statutes have been enacted to the contrary. In the United States it is a generally accepted rule that in the absence of statutory or constitutional provisions to the contrary no suit may be maintained against either the United States or any of the 48 states.

Education is a function of the state. The state may administer its school system directly or it may delegate this authority to other agencies. These agencies, while engaged in the administration of the state's educational system, are considered as governmental agencies. Therefore, the courts are generally agreed that these agencies, while performing governmental functions, are not liable in damages for tort. The courts have held that this rule applies to these agencies even when they are performing educational duties which the state has not imposed upon them but which they have voluntarily assumed by permission of the state.

Another line of reasoning followed by some of the courts holds that the district is exempt from liability because it has limited powers only which do not include the power to raise money for paying damages. Likewise, the

courts have sometimes refused to hold school districts liable in damages for tort on the ground that to do so is against public policy. In a few cases courts have been asked to hold school districts liable for the negligent acts of their agents or employees, under the rule of *respondeat superior*. This the courts have consistently refused to do on the ground that the master-servant relationship does not exist between a school district and its agents and employees.

The general rule of non-liability has been applied where the injuries complained of have been received by students, employees, or by third parties, while on the school grounds. It has also been applied to the case of a person who was on school property as an invitee and where admission was by fee. Likewise, it has been applied where the acts complained of have been performed by the school board or by the board's agents or employees.

The courts of only one state—New York—have refused to follow the general rule of non-liability. Here, the common law rule applies only where the act complained of was performed by agents or employees of the school board; boards of education are held liable in their corporate capacity for injuries resulting from their own negligence.

There is yet another class of cases involving the liability of school districts in damages. This class involves the wilful, positive misconduct of school officers in their corporate capacity. The appropriate action in such cases is an action for trespass or for maintaining a nuisance. The courts are divided on the question of liability in such cases.

CHAPTER VII

THE STATE AND SCHOOL OFFICERS

THE AUTHORITY OF THE STATE TO DETERMINE THE MODE OF APPOINTING SCHOOL OFFICERS

Because education is a matter of state concern the legislature has the authority to determine the units of administration. Similarly, it has the authority to determine the nature of the machinery to be used in administering education in the state and local units. It also has, in the absence of constitutional restriction, the authority to determine how the local school board shall be selected (71, 72, 133, 390). A Connecticut court has gone one step further (72). It not only held that the legislature had the power to determine how members of the school board or school committee should be selected, it went so far as to decide that it is not necessary that a school board member be a resident of the district of which he is an officer.

RELATION OF SCHOOL OFFICERS TO THE STATE

School officers are state officers (38, 63, 69, 71, 72, 133, 180, 184, 189, 194, 197, 202, 206, 210, 252, 356, 407, 410, 419). They are not local or municipal officers as are members of the city council, but are held by the courts to be officers of the state with the function of performing the duties of the state with regard to local educational affairs. This view is accepted by practically all courts without exception, although a somewhat different position was taken by a Texas court (413). The legislature of the state of Texas had passed an act providing for the removal of county officers. This case was an action involving the right of a district judge to remove a district school trustee, according to the provisions of this act. According to the statute in

question school trustees were not specifically mentioned in the enumeration of county officers. In its decision the court pointed out that school trustees were public officers performing state functions, but at the same time it held that with regard to the act in question they were to be regarded as county officers on the ground that such seemed to be the intent of the legislature, because it failed "to provide otherwise any manner for their removal." It is clear, however, that even though the court considered school trustees as county officers for the purpose of interpreting a statute, it did not lose sight of the fact that they were, in reality, state officers. Another Texas decision, and a later one, took a different view of the matter and held that a county superintendent of schools is a state and not a county officer (419):

Though in a sense a county officer and though called 'county superintendent', he is in fact the officer and agent of the State,—the State having assumed the function of maintaining public free schools for the education of the children throughout its domain, the counties being recognized with reference to that business merely as convenient subdivisions of territory and some of their officers as proper agents for the administration of affairs relating to the public free schools. Such officers, with respect to such affairs, act for the State and not for the county.

Status of municipal officers when performing school functions.— In some cases, the legislature has provided that city officers shall, by virtue of their office, exercise certain powers with respect to the public schools of the city. Whenever such is the case, the courts are agreed that the city officers become *ex officio* school officers, and thus, state officers (133, 180, 206).

The Supreme Court of Kansas has held, very explicitly, that city officers are *ex officio* state officers representing the state whenever they perform any act with respect to the administration of schools (180):

The city council, in whatever it does concerning the levy made by the board of education for school purposes, does not act for the city, but advisory to the members of the board of education. The members

of the city council, when considering tax levies made by the board of education for school purposes, act *ex officio* as members of the school board. The same power which the council possesses might have been conferred by law on the county clerk or any board other than the governing body of an incorporated city. . . . The power which the council exercises in the respect mentioned is not a municipal function. It does not pertain to authority which is to be exercised for and on behalf of the city.

PERSONAL LIABILITY OF SCHOOL OFFICERS
IN DAMAGES FOR TORTS

School officers are executive or administrative officers. Included under the classification of state administrative officers are such officers as the governor and department heads as well as boards of officers, such as school boards. These latter officers are generally referred to as ministerial, quasi-judicial, or administrative officers to distinguish them from executive, legislative, and judicial officers proper, although they perform executive, legislative, and judicial functions.

The duties of school officers may be divided into two general classifications: (a) discretionary, and (b) ministerial. In the performance of discretionary duties, school officers must exercise their own discretion or judgment, while in the performance of ministerial duties they merely perform duties required of them by statute or by a superior officer. The difference between discretionary or judicial acts and ministerial acts has been explained by an Illinois court as follows (105):

Official action is judicial [or discretionary] where it is the result of judgment or discretion. It is ministerial when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty, that nothing remains for judgment or discretion.

Personal liability in performance of discretionary duties.— In common-law the rule is that school officers are not liable in damages for torts growing out of their performance of discretionary duties as long as they act in good faith (111, 140, 150, 219, 224, 270, 288, 311, 320, 358, 362, 366, 383). A decision of the Supreme Court of Illinois il-

lustrates the line of reasoning upon which this rule is based (111). It said, in part:

In such cases, the law seems to be well settled there can be no action maintained against school officers where they act without malice.

The rule is certainly a reasonable one. A mere mistake in judgment, either as to their duties under the law or as to facts submitted to them, ought not to subject such officers to an action. They may judge wrongly, and so may a court or other tribunal, but the party complaining can have no action when such officers act in good faith and in the line of what they think is honestly their duty. Any other rule might work great hardship to honest men, who, with the best of motives, have faithfully endeavored to perform the duties of these inferior offices. Although of the utmost importance to the public, no considerable emoluments are attached to these minor offices, and the duties are usually performed by persons sincerely desiring to do good for their neighbors, without any expectation of personal gains, and it would be a very harsh rule that would subject such officers to an action for damages for every mistake they may make in the honest and faithful discharge of their official duties as they understand them. It is not enough to aver the action of such officers was erroneous, but it must be averred, and proved that such action was taken in bad faith, either wantonly or maliciously. If, in the discharge of their official duties, such officers simply err, it is what other tribunals invested with discretionary powers are liable to do.

Personal liability for torts of the school corporation.—It has already been shown that school officers, in the exercise of discretionary power, are not liable, personally, for injuries resulting from errors in judgment. Likewise, they are not liable, personally, for torts of the school corporation (248, 318, 324, 328, 400). An action of the board is in no sense an action of the officers individually. Therefore, if the tort is that of the board the individual members cannot be considered as liable, personally. A South Dakota court, in speaking of the personal liability of school officers, said (400):

School districts are state agencies exercising and wielding a distributive portion of the sovereign power of the state, and the officers of school districts are the living agencies through whom the sovereign state act is carried into effect. A school district officer in the performance of his duties acts in a political capacity, as much so as the

Governor of a State, and is not liable for negligent acts of omission occurring in the performance of such political or public duties, unless the sovereign power of the state has authorized and consented to a suit for such negligence.

Personal liability for acts of employees and contractors.— Likewise, the members of a board of education cannot be held personally liable for acts of their employees or for the acts of those with whom they have contracted (173, 233, 320).

This rule of non-liability has also been held to apply to others engaged in educational pursuits as well as to local school officers. For example, the Indiana Supreme Court has applied this rule to county superintendents (150).

Personal liability for acts growing out of malice and for ultra vires acts.— It should be noted, however, that this rule of non-liability applies only when the discretionary act complained of is performed in good faith and within the scope of the authority of the board. If the act is the result of malice, or of corrupt motives, or is *ultra vires* the school officers are responsible, personally, in damages (111, 150, 219, 288, 316, 358, 361, 362, 383, 417).

Personal liability for refusal to perform discretionary acts.— In connection with this principle of non-liability of school officers for injuries resulting from their performance of discretionary acts, it should be noted that in some jurisdictions non-liability attaches only when the officers perform their acts. Officers vested with discretionary duty must at least act, and if injury results from their refusal to act, they may be held personally liable. Such was the decision of a Michigan court (255):

There is a distinction, . . . between cases where parties invested with discretionary authority exercise it to the injury of an individual, and where they neglect to exercise it at all. If the law imposes the duty, and calls for action, where such duty is imposed for the benefit of private individuals, the person neglecting the duty to the injury of an individual would be liable whether the duty involved the exercise of discretion or not.

Personal liability for ministerial acts.—It is a principle of common-law that school officers are liable for their torts committed in the performance of ministerial acts or duties, providing such duties are imposed upon individual officers and not upon the corporate body. In the performance of such duties, school officers must adhere strictly to the statutes. They become individually liable when they fail to perform required duties, when they act negligently, or when they act beyond their statutory authority (87, 140, 162, 255, 263, 276, 279, 280, 284, 307, 386). In this connection, it should be noted that an Indiana court has gone so far as to hold a township trustee personally liable in damages for the omission of a duty imposed by statute, on the ground that because each township had but one trustee, statutory duties imposed upon township trustees are imposed upon individuals rather than corporate bodies (162).

The statutes often require the performance of an act and at the same time specify the mode of performance. This is true, especially, with respect to the management of school finances. When such is the case the statute must be adhered to strictly and liability usually results from loss caused by neglect in following the specification (87, 284, 307, 386). The same principle is applicable in other connections. For example, statutes generally require the board of education to take a bond from contractors to insure the faithful performance of the contract and the payment to material-men and laborers. This becomes, according to a number of jurisdictions, a ministerial act, and it has several times been held that neglect to take such a bond makes the board liable for loss sustained by such material-men and laborers (255, 263, 279, 280). Other courts have taken a contrary position and have held that board members are not personally liable for failure to perform a ministerial duty where the duty is imposed upon the board in its corporate capacity (400).

Exceptions to the general rule.—No discussion of the liability of school officers for injuries resulting from the performance by the board of ministerial duties is complete

without making reference to the Indiana case of *Adams v. Schneider* (140). The board of education decided to hold a "Field Day Exhibition" on the baseball field. They empowered Fish, the clerk of the board, to make all necessary arrangement, part of which consisted in the erection of temporary bleachers. He, in turn, hired the man who had erected them the two previous years to erect them again. He gave this man no plans or specifications but told him to erect them as he had done previously. The public was invited to the exhibition and fees were charged for admission. The seats gave way and the appellant was thrown to the ground and seriously injured. After the accident, the seats were inspected and it was found that only six and eight penny nails had been used, that the seat boards were not nailed properly, and that there was not sufficient bracing. Action for damages was then brought against the members of the board and the clerk, individually. The court held them liable on the ground they were performing a ministerial duty. It reasoned as follows:

A duty is discretionary when it involves on the part of the officer to determine whether or not he should perform a certain act, and if so in the exercise of such discretion, he is not liable. His duties, however, in the performance of the act, after he has once determined that it shall be done, are ministerial, and for negligence in such performance, which results in injury, he may be liable in damages. . . .

If this line of reasoning was generally followed it would virtually make every discretionary act a ministerial act, ultimately. One cannot help wondering if the court did not make too fine a distinction in the case just mentioned. Many courts, no doubt, would have held that the act complained of was a discretionary act and that the board and its clerk were not individually liable for injuries resulting under the circumstances.

SUMMARY

Education is a matter of state concern. It follows that the state has the power to determine the units and methods it will employ in the administration of its school system.

This power has been held to include the power to determine the method of selection of the local school board.

Because education is a matter of state rather than local concern, the courts have held that school officers are state officers. They are not local officers as are members of the city council, but are officers of the state charged with the duty of administering the state's educational affairs in the local district. The courts have held, moreover, that municipal officers, in the performance of educational duties, do not represent the municipality but act as state officers *ex officio*.

The duties of school officers may be divided into two general classifications: (a) discretionary duties, and (b) ministerial duties. At common-law, the rule is that school officers, because they are officers of the state, are subject to the same rule of non-liability in damages for tort as are state officers. In other words, school officers are not liable, individually, in damages for torts growing out of their performance of discretionary duties as long as they act in good faith and without malice. In some states this rule of non-liability attaches only when school officers perform their acts. Officers vested with discretionary duties must at least act, and if injury results from their refusal to act they may be held personally liable. Likewise, it is generally held that school officers are liable for their torts committed in the performance of ministerial acts or duties, providing such duties are imposed upon individual officers and not upon the corporate body.

CHAPTER VIII

THE STATE AND SCHOOL TAXES ¹

The education of children is now recognized as a public duty and as a justifiable object of taxation. The right to tax for educational purposes as well as for all other purposes rests with the state and must be exercised by the legislature (184, 363). This right of taxation is vested in the legislature by organic law, and as a common law principle it may be said that this right is incapable of being delegated by the legislature. There is one exception to this rule, however, and that is in the case of minor political subdivisions of the state, or their appointed agencies, which are generally vested with the power of raising revenue for the purpose of providing expenses of local government (363). Therefore, school districts are generally vested with the power to levy taxes for the support of local schools (184, 302, 363, 390, 447). It is generally held, in the absence of constitutional restrictions, that the legislature has the power to grant a school district the power to levy and collect a tax for school purposes (184, 265, 345, 363). It has also been held that the legislature may go one step beyond this and may compel a school district to levy and collect a tax for school purposes even without the consent of those who are to be taxed (184). This is so because school taxes are for a state purpose. The school district is a creature of the state organized for the purpose of assisting the state in the administration of its educational system. The state, in creating the school district, retains control of it and has plenary power over it. Therefore, the state may require the school district to raise

¹ Much of the material in this chapter is used here with the permission of the *American School Board Journal*. Lee O. Garber, "Legal Principles Underlying Taxation for Educational Purposes," *American School Board Journal*, LXXXVII (July, 1933), 29-30.

a tax and may compel it to do so without the consent of those who are to pay the tax. The courts consider a school district as a municipal corporation within the meaning of the rule that the power of taxation is a legislative power which cannot be delegated except to municipal corporations (343, 363).

SCHOOL TAXES ARE STATE TAXES

The courts are generally agreed that school taxes are not local or municipal taxes in any sense of the word, but that they are state taxes (38, 189, 191, 194, 197, 208, 349, 363, 367, 387, 389, 410, 415). Such is the case because education is a function of the state, and because schools and school districts are agencies of the state.

AUTHORITY OF THE MUNICIPALITY TO TAX SCHOOL PROPERTY

According to the weight of authority the property of the state, consequently school property, cannot be taxed by the municipality, neither can special assessments for improvements be levied against property used for state purposes (33, 231, 281, 282, 291, 296).

It should be pointed out, however, that the courts in a substantial majority of the states permit special assessment of school property for local improvements (165).

The courts hold that school property, because it is state property, cannot be levied upon; therefore they will not issue executions against the property of school districts (65, 292, 343).

AUTHORITY OF THE LEGISLATURE TO PROVIDE FOR THE DISTRIBUTION OF SCHOOL REVENUE RAISED BY TAXATION

In the exercise of its legislative power, the legislature may grant school districts the authority to tax for educational purposes. It may even require school districts to levy and collect a school tax. In addition, it may go one

step further and may stipulate the means and method of distributing the tax money collected by the school districts (112, 155, 164, 221, 348, 360). This follows from the fact that school taxes are state taxes. The schools belong to the state and the state has the authority to provide for them in any manner that it sees fit. It provides for the levying of a tax to support schools. This tax is a state tax, and in the maintenance of a uniform school system the state may expend it as it sees fit. The state may expend all the money collected from a school district through school taxes, in that district, or it may put part or all of it in a state fund to be distributed to other school districts than the one in which it was collected. School taxes are state funds to be used for the common good.

SUMMARY

Education is a function of the state. Therefore, the courts are agreed that the legislature has the power to grant to school districts the authority to levy and collect taxes for school purposes. It has also been held that the legislature may go one step beyond this and may compel a school district to levy and collect a tax for school purposes without the consent of those who are to be taxed.

The courts are generally agreed that school taxes are not local or municipal taxes, but that they are state taxes. They are taxes paid for the purpose of providing funds for the execution of a state function.

Because of the relationship of education to the state, some courts hold that the municipality cannot tax school property; neither can a special assessment for local improvements be levied against property belonging to the school district. This follows from the fact that the state, in creating municipalities, cannot be presumed to have granted them the implied power of taxing state property. The courts hold that the principle of uniformity of taxation is not violated when the state levies a state-wide school tax and distributes it in such a way as to maintain a uniform school system. Since education is a matter of state rather than of

local concern, taxes raised in one school district may be used to support schools in other districts.

CHAPTER IX

SUMMARY

It was pointed out that the purpose of this study was threefold. It was stated that an attempt would be made: (1) to analyze the debates of the constitutional conventions in order to determine what the framers of state constitutions have had in mind concerning the proper relationship of the state educational system to organized society and to the individual; (2) to discover the relation of the state to education as defined by the courts; and (3) to point out the applications which the courts have made of the concept of education as a state function to practical problems of school administration. An attempt will now be made to summarize the findings of this study with reference to each of these three purposes:

1. The debates and proceedings of the constitutional conventions of the states reveal in a significant manner the relationship which it was expected would exist between the state and education. Thirty-seven of these proceedings were examined in order to determine what the members of the state constitutional conventions had in mind concerning this relationship. It was found that the majority of the members of the conventions regarded it as a duty of the state to provide a system of public educational institutions in which the youth of the state might receive adequate training for the duties of citizenship. Only a few members felt that the state should take no responsibility for the education of its future citizens. These members felt that the education of the youth was a private matter and in no sense a duty of the state.

Those who looked upon education as a function of the state regarded public education as conferring four main benefits upon society and upon the individual. In the first

place, they regarded public education as essential to the safety and political well-being of the state. In fact, they regarded it as essential to the very existence of the state. In the second place, they regarded public education as essential to the economic well-being of the state. In the third place, these delegates looked upon public schools as the most effective agency at the state's disposal for the elimination of such social evils as crime and pauperism. Finally, a few regarded public education as a natural right of the individual. They looked upon it as a gift which the state owed to the child.

Although a large majority of the delegates to the constitutional conventions considered education as a function of the state, there was some division of opinion concerning the limits to which the state should go in providing a system of public education. Some felt that the state's responsibility should cease with the offering of the common branches. Others, however, felt that the state should furnish higher education to all. These differences of opinion are to be accounted for, no doubt, by the lack of knowledge of the amount of education necessary to accomplish the objects which the delegates had in mind.

2. The courts, in expressing their concept of the relationship existing between education and the state, are generally agreed that education is a function of the state. They hold that the control and management of the public schools is an attribute of sovereignty. They point out that the administration of the public schools is as much a function of the state as is the police power, the power to tax, the power to build roads, or the power to build and manage prisons and asylums.

3. The applications of this concept of education as a function of the state are numerous. The courts resort, repeatedly, to this concept in building up the lines of reasoning employed in arriving at their decision in many of the cases involving question of educational administration. Thus, it has been held that, because of the relationship of education to the state, the legislature has the power to legis-

late concerning the control and management of the public school system of the state. The legislature is the source of power and its authority is full and complete unless restricted by the state or federal constitutions. It may provide for kindergarten, elementary, secondary, and higher education. It may determine the length of the school term and the nature of the courses offered. It may use the power of which it is possessed, itself, or it may delegate this power to such agencies as it desires. It may make use of existing municipal agencies, or it may create new agencies for the purpose of administering public education. It may abolish these agencies whenever it feels so inclined. It may change the boundaries of existing agencies, and in so doing it may divide the assets and liabilities of the old district as it sees fit. If the act of segregation is silent concerning the common property and common debts, however, the old corporation retains all the property within its new boundaries and assumes the responsibility for the payment of all the debts.

The courts have held that the power to administer the educational system is in no sense an inherent municipal function. The municipality as such has no control over education unless it has been granted this power, expressly, by the state. Even though the municipality is given the authority to control the school within its own bounds, the administration of the schools is separate from the administration of purely municipal affairs. One is a state function, the other a local function. In the absence of statutory authority the municipality cannot spend municipal funds for school purposes, neither can it donate land for school purposes. Likewise, the municipality cannot exercise its police power over the property of the school district, because such property is state property. The courts also hold that the changing of the boundaries of the municipality has no effect upon existing school boundaries.

School districts are creatures of the state, and are engaged in the performance of duties for the state. Therefore, the courts are generally agreed that school districts are not liable in damages for injuries sustained by pupils

and employees while they are on the school grounds, even though the injuries result from acts of negligence of school officers or their agents. Likewise, it is generally held that school districts are not liable in damages to third parties who are injured as the result of the performance of some act by school district officers or their agents, provided the act that resulted in injury is essential to the performance of the governmental functions of the district. It has also been held that the district is not liable in damages to invitees who are injured while attending some function held on school property where admission is by fee. The rule of non-liability in damages for injuries applies to municipalities while engaged in school administration for the state. In case a school district maintains a nuisance or commits acts of trespass the courts are divided on the question of the district's liability.

The administration of an educational system being a function of the state, it follows that school officers are state officers. They act for the state and are subject to the same rules of personal liability as are the other state officers. They are not personally responsible for torts growing out of their performance of discretionary duties as long as they act in good faith. They are, however, generally held responsible for torts growing out of their performance of ministerial duties providing such duties are imposed upon individual officers and not upon the corporate body. In the first case they are protected by the corporate cloak, while in the second case, while acting as individuals instead of a body, they are afforded no such protection.

Courts are also generally agreed that school taxes are state taxes. Such taxes belong to the state, and the local community in which they are collected has no title to them. Because school taxes are regarded as state taxes, the legislature may in the maintenance of a uniform school system provide for the distribution of school revenue raised by taxation as it sees fit, so long as it uses the revenue for school purposes. Schools are state institutions; the municipality has no right, according to the weight of authority, to levy and collect a tax on school property for local improvements.

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